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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 384

AMERICAN NATURAL GAS COMPANY,
MADISON GAS AND ELECTRIC COMPANY,
MICHIGAN CONSOLIDATED GAS COMPANY,
MICHIGAN WISCONSIN PIPE LINE COMPANY,
MILWAUKEE GAS LIGHT COMPANY and
MILWAUKEE SOLVAY COKE COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR PETITIONERS

ARTHUR R. SEDER, JR.,
MIDDLETON MILLER,
JULES M. PERLBERG,
111 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Petitioners.

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

TWENTIETH CENTURY PRESS, INC., CHICAGO 5

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SUPREME COURT OF THE UNITED STATES

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MADISON GAS AND ELECTRIC COMPANY,
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In the brief in opposition to the petition for certiorari, respondent has consistently stated that:

> "* * * the only issue here is whether the divestment order pursuant to which the stock was sold by taxpayer constituted a 'requisition or condemnation' of the stock by the S.E.C." (Br. 9).

By repeatedly making this statement (see also Br. 2, 3 and 5), respondent has attempted to avoid reference to the full language of Section 117(j) of the Internal Revenue Code of 1939 and the circumstances of the divestment order. The

precise issue before the Court of Claims, and the question presented for review, is whether the sale of the Detroit Edison stock pursuant to order of the Securities and Exchange Commission constituted a compulsory or involuntary conversion of a capital asset within the meaning of Section 117(j). The statutory clause involved is:

> "* * * compulsory or involuntary conversion (as a result of * * * seizure, or an exercise of the power of requisition or condemnation or *the threat or imminence thereof*) of * * * capital assets * * *." (Emphasis supplied)

The respondent's brief in opposition has significantly avoided reference to the phrase "the threat or imminence thereof" in Section 117(j). Respondent has also pointedly ignored the fact that under Section 11(d) of the Public Utility Holding Company Act the Securities and Exchange Commission had the power to "take exclusive jurisdiction and possession" of American's assets and had the "power to dispose of any or all of such assets." The record in this case indicates that the Commission on several occasions threatened resort to this Section 11(d) procedure (Findings 11, 13).

By thus failing to recognize the "threat or imminence" language in Section 117(j) and the threat of Commission action under Section 11(d), respondent has asserted that *Commissioner* v. *Gillette Motor Transport, Inc.*, 364 U.S. 130 (1960) and *Midwest Motor Express, Inc.* v. *Commissioner*, 251 F. 2d 405 (8th Cir. 1958) cert. den. 358 U.S. 875, "have no bearing upon the issue here presented" (Br. 8). However, respondent admits that in both *Gillette* and *Midwest* the courts recognized the parenthetical clause of Section 117(j) to be fully satisfied by the Government action

there involved, namely, the assumption of limited control of the assets of motor carriers to insure compliance with a War Labor Board order. Petitioners submit there is no substantive difference between this action and the Government action threatened here, whereby the Commission could take possession of American's assets under Section 11(d) of the Public Utility Holding Company Act. It is in this respect that the Court of Claims decision in this case cannot be reconciled with *Gillette* and *Midwest*.

Respondent asserts that Congress specifically legislated to grant tax relief to divestments under the Public Utility Holding Company Act by the enactment of Supplement R of the 1939 Code and that if Section 117(j) was to cover such divestments, the tax relief of Supplement R would have been "largely superfluous" (Br. 7-8). However, respondent neglects to point out that the enactment of Supplement R preceded Section 117(j) and that relief provisions for losses resulting from Commission divestment orders were subsequently taken out of Supplement R at the time Congress enacted Section 117(j). In the Revenue Act of 1942 Congress specifically noted that losses from such holding company divestments, which it denominated to be "involuntary" and "compulsory," were to be treated by provisions of the Internal Revenue Code outside of Supplement R. In the same act it passed Section 117(j) to provide tax relief for losses from involuntary conversions. The legislative history of the 1942 Act clearly indicates that Congress intended to grant tax relief in the case of losses resulting from such holding company divestments and that Section 117(j) was designed to provide this tax relief. See H.R. Rep. No. 2333, 77th Cong., 2nd Sess. (1942) (1942-2 Cum. Bull. 372 at 397, 415, 446, 463); S. Rep.

No. 1631, 77th Cong., 2nd Sess., (1942) (1942-2 Cum. Bull. 504 at 595, 622-3, 687).[1]

Respondent has also implied that a sale is not entitled to be treated as an involuntary conversion under the Internal Revenue Code (Br. 7). On the contrary, no court has ever denied involuntary conversion relief because the conversion was in the form of a sale of property, and sales transactions necessitated by Government action have consistently been held to be involuntary conversions under Sections 117(j) and 112(f). See e.g. *Davis Regulator Company*, 36 B.T.A. 437 (1937); *Harry G. Masser*, 30 T.C. 741 (1958); *Frank O. Maixner*, 33 T.C. 191 (1959).

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR R. SEDER, JR.,
MIDDLETON MILLER,
JULES M. PERLBERG,
11 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Petitioners

SIDLEY, AUSTIN, BURGESS & SMITH,
Of Counsel.

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1. Respondent in its references to legislative history in the footnote on page 6 of its brief, significantly omits any reference to the history of the Revenue Act of 1942, which first contained Section 117(j). The legislative background of that act and that of the Revenue Act of 1938, in which Supplement R was first enacted, clearly demonstrate the Congressional intent to grant Section 117(j) relief to the transaction involved here. See also Hearings before Sen. Fin. Comm. on H.R. 9682, 75th Cong. 3d Sess. pt. 4; pp. 72-3; S. Rep. No. 1567, 75th Cong. 3d Sess. (1939-1 Cum. Bull. (part 2) 779 at 785).